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No. .....

In The

Supreme Court of the United States

OCTOBER TERM, 1984

GARLAND INDEPENDENT SCHOOL DISTRICT, et al.,

Petitioners,

v.

STERLING WILKS, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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43PP

QUESTIONS PRESENTED

1. Whether damages are available to parents under the Education of the Handicapped Act (EAHCA), who provide private after school services and for related expenses incurred in the education of handicapped children.

2. Whether parents who unilaterally decide to provide their handicapped children with private after school hours services are barred from reimbursement under the EAHCA, 20 U.S.C. § 1415(e) (3), for expenses for the cost of said services and related expenses.

LISTING OF PARTIES

PETITIONERS:

Garland Independent School District

Cooperative Behavior Center

Garland-Richardson Special Education Cooperative
(Now known as Dallas County Suburban Cooperative)

Eli Douglas, Superintendent of Garland Independent School District

Doris McDaniel, Director of Special Education of Garland Independent School District

Thomas W. Poore, Center Leader of the Cooperative Behavior Center
(Replaced Gretchen Jarvis)

Donald Blevins, Coordinator of Garland-Richardson Special Education Cooperative
(Now known as Director of Dallas County Suburban Cooperative)

Jim Burns, Member of the Garland Independent School District Board of Trustees

Harris Hill, Member of the Garland Independent School District Board of Trustees

Cash Birdwell, Member of the Garland Independent School District Board of Trustees

Sydna Gordon, President of the Garland Independent School District Board of Trustees
(Replaced Donald Senter)

Mike Cloud, Member of the Garland Independent School District Board of Trustees

Don Hollenshead, Member of the Garland Independent School District Board of Trustees
(Replaced Darwin Morris)

M. D. Williams, IV, Member of the Garland Independent School District Board of Trustees
(Replaced Jim Kennedy)

ATTORNEYS FOR PETITIONERS:
Law Offices of Earl Luna, P.C.
Earl Luna
Robert T. Miller, Jr.

RESPONDENTS:
Sterling Wilks
Victoria Wilks

ATTORNEYS FOR RESPONDENTS:
Advocacy, Inc.
Reed Martin

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v.

STERLING WILKS, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Your Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on September 7, 1984, rehearing en banc and panel rehearing denied February 13, 1985.

OPINIONS BELOW

The United States District Court for the Northern District of Texas, Dallas Division, filed its Order dismissing this case as moot on January 17, 1984, which is reprinted in Appendix A.

The United States Court of Appeals for the Fifth Circuit filed its unpublished opinion on September 7, 1984, which is reprinted in Appendix B.

The unpublished Order of the United States Court of Appeals for the Fifth Circuit, filed February 13, 1985, denying Petition for Rehearing and Suggestion for Rehearing En Banc, is reprinted in Appendix C. The mandate was issued on February 25, 1985, reprinted in Appendix D, and on March 25, 1985, the Court entered its Order granting a recall and stay of the mandate until April 22, 1985, which Order is reprinted in Appendix E.

GROUNDS FOR JURISDICTION

The Judgment sought to be reviewed was entered by the United States Court of Appeals for the Fifth Circuit on September 7, 1984. Petitioners' timely Petition for Rehearing and Suggestion for Rehearing En Banc were denied on February 13, 1985, and this Petition for a Writ of Certiorari was filed within ninety (90) days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

United States Code, Title 20:
§ 1415(e)(3)

> During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child.

STATEMENT OF THE CASE

This case commenced administratively with a hearing requested by Respondents on October 5, 1981, before a hearing officer appointed by the Texas Education Agency seeking 24 hour/12 month continuous residential placement for Respondent Sterling W., who was an eight year old male residing in Sachse, Texas, within the jurisdiction of Petitioner Garland Independent School District, hereinafter referred to as "GISD." In July of 1983, Sterling W. left the jurisdiction of the GISD and now resides within the jurisdiction of the Round Rock Independent School District. (R. 354, 400). However, the Respondents are still seeking reimbursement for Mrs. Wilks' unilateral employment of an individual to stay with her son at home after school. (R. 420). The testimony at the hearing showed that Mrs. Wilks was capable of taking care of her son, "... of learning to teach an autistic child, to care for an autistic child." (A. Vol. 1, p. 323).

Sterling is a handicapped child within the meaning of the Education of All Handicapped Children Act of 1975 (EAHCA), 20 U.S.C. § 1401, *et seq.* However, there is disagreement between experts as to his exact diagnosis which has included autism and mental retardation. (A. Vol. 1, pp. 74, 75, 86, 87, 205, 206, 207, 210, 271, 272, 273).

Sterling was first enrolled in the GISD and placed at the Cooperative Behavior Center operated by the GISD, hereinafter referred to as "CBC", in February of 1979, where he remained through June and then returned again in August until Mrs. Wilks removed him in October of 1979. (A. Vol. 1, pp. 20, 23, 29).

Mrs. Wilks then enrolled him in the Lynne Developmental Center (formerly the Autistic Treatment Center) in

October, 1979, as a day student. (A. Vol. 1, pp. 30, 31). Subsequent to that time, he became a residential student from November of 1979 until April of 1980, when he again became a day student until August of 1980. (A. Vol. 1, p. 31).

Sterling was re-enrolled at the CBC from September, 1980, until February of 1981, at which time he was placed in Children's Medical Center for six weeks and returned to the CBC from April, 1981, to June, 1981, and from September, 1981, until July, 1983, when Mrs. Wilks moved away from the GISD. (A. Vol. 1, pp. 45, 46, 47).

Sterling's placement at the CBC was the result of the Admissions, Review, and Dismissal (ARD) Committee's recommendation in conformance with the Individual Educational Plan (IEP) which was developed for him. However, Mrs. Wilks disagreed with this placement and asked for a 24 hour/12 month continuous residential placement for Sterling. The case was heard by an Impartial Hearing Officer who recommended a residential placement for Sterling in order for him to develop to his full potential. The Hearing Officer's decision was rendered on February 1, 1982, prior to the Supreme Court's decision in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982), which vitiated the standard used by the Hearing Officer and established the appropriate standard to determine if a student is receiving a "free appropriate public education" under the terms of the EAHCA.

The GISD brought suit in state court for review of the Hearing Officer's decision pursuant to 20 U.S.C. § 1415(e); and alleging that "[a]lthough GISD believes the best interest of the child will be served if the mother will continue to perform the parental functions required by the Texas Family Code, if the Court finds that she is either incapable of per-

forming them or refuses to perform them, the Court should take the action provided for in the Family Code." (R. 22-23). Respondents removed to federal court and cross-claimed alleging that Sterling's placement at the CRC and Plaintiff's failure to provide him with a full time residential placement violate his rights secured by the EAHCA, Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794), and the Fourteenth Amendment to the United States Constitution, actionable pursuant to 42 U.S.C. § 1983. (R. 61). Respondents prayed for damages as a result of the alleged deprivation of these rights but did not plead any allegation of reimbursement of expenses for after school hours care or "exceptional circumstances" such as physical harm which required the hiring of after school hours care. (R. 63).

Petitioners moved for Summary Judgment based on mootness and the unavailability of damages to Appellees as a matter of law, and the District Court dismissed the case for mootness "[s]ince Sterling and his mother no longer live within the jurisdiction of the GISD, but instead have become residents of the Round Rock Independent School District subject to its jurisdiction." (Appendix A-2).

The Fifth Circuit panel vacated and remanded the case to the District Court for further factual development and consideration because "a substantial question exists whether Mrs. Wilks is entitled to reimbursement under the EAHCA . . . concerning whether the program offered by the school, unsupplemented by additional services, would have resulted in physical harm to Sterling." (Appendix B-3). This is simply not so because the costs of private services for someone to stay with Sterling were unilaterally secured and these costs were not sought by the Respondents in their Counterclaim but rather were only requested by the Respondents in

their Opposition to Motion for Summary Judgment. (R. 420). Furthermore, the Respondents have not alleged in their Counterclaim or offered any evidence that Mrs. Wilks' hiring someone to stay with Sterling for which she is seeking reimbursement and "other expenses" were necessary to protect Sterling's physical health from a "serious risk of injury." See *Anderson v. Thompson*, 658 F.2d 1205, 1214 (7th Cir. 1981). Therefore, summary judgment is appropriate in this case.

REASONS FOR GRANTING THE WRIT

A writ of certiorari should be granted to resolve the Questions Presented which concern whether damages are available to parents under the EAHCA for the private provision of after school help and for related expenses incurred in the education of handicapped children, whether Mrs. Wilks is entitled to reimbursement under the Education for All Handicapped Children Act for a unilateral hiring of someone to stay with her son Sterling without the consent or knowledge of the Petitioners, and whether there are exceptions to the EAHCA which would allow reimbursement in those circumstances necessary to protect the physical health of handicapped children from "serious risk of injury." The Respondents did not request such reimbursement in their Counterclaim, and have not offered any evidence of such "exceptional circumstances."

The decision below was rendered on September 7, 1984, prior to the time which this Court granted the petition for writ of certiorari to the United States Court of Appeals for the First Circuit in the case of *School Committee of the Town of Burlington v. Department of Education of the Commonwealth of Massachusetts*, 736 F. 2d 773 (1st Cir.

1984), cert. granted, 105 S.Ct. 562 (1984). The questions presented to the Court in that case are:

(1) Under Education of the Handicapped Act (EHA), 20 U.S.C. § 1415(e)(3), where parents unilaterally decide to place a child in private school, do they forfeit the right to be reimbursed for tuition and expenses related to such placement?, and

(2) Does EHA provide damages remedy to reimburse parents for private school tuition and related expenses incurred in education of handicapped child?

53 U.S.L.W. 3414 (U.S. Dec. 3, 1984). The case was argued before this Court on March 26, 1985, and a decision in the case should effectively adjudicate whether a parent is entitled to any reimbursement for private school tuition and for related expenses incurred in the home care of her handicapped child after school was out.

The decision below is in direct conflict with the decision of the Fourth Circuit in *Stemple v. Board of Education of Prince George's County*, 623 F.2d 893 (4th Cir. 1980), cert. denied, 450 U.S. 911, 101 S.Ct. 1348 (1981), and its subsequent decision in *Rowe v. Henry County School Board*, 718 F.2d 115 (4th Cir. 1983), and the Eighth Circuit's opinion in *Miener v. State of Missouri*, 673 F.2d 969 (8th Cir. 1982), cert. denied, 459 U.S. 909, 103 S.Ct. 215 (1982), and cert. denied, 459 U.S. 916, 103 S.Ct. 230 (1982), as to whether the parent of a handicapped child should be barred as a matter of law under EAHCA from being reimbursed for having unilaterally secured home care for that child after school was out, as to whether the EAHCA provides a damage remedy to reimburse a parent for those private expenses incurred to take care of her handicapped child after school was out, and as to whether there are exceptions to the

EAHCA, which would allow reimbursement in those circumstances necessary to protect the physical health of the handicapped children from "serious risk of injury." Sterling, like non-handicapped minors, needed some care after school was out and until school started again. However, our question is whether a parent is entitled to have the school pay for that care in this case where the parent was shown to be capable of doing so, if her time is not otherwise committed. These issues are substantial and important federal questions which have not been, but which should be, settled by this Court.

SIMILAR QUESTIONS ARE PENDING BEFORE THIS COURT

The questions which are before this Court in *School Committee of the Town of Burlington, supra,* are dispositive of the issues in this case. This Court heard oral argument in that case on March 26, 1985, concerning the following questions presented:

(1) Under Education of the Handicapped Act (EHA), 20 U.S.C. § 1415(e)(3), where parents unilaterally decide to place a child in a private school, do they forfeit the right to be reimbursed for tuition and expenses related to such placement?

(2) Does EHA provide a remedy by way of damages to reimburse parents for private school tuition and related expenses incurred in the education of a handicapped child?

53 U.S.L.W. 3414 (U.S. Dec. 3, 1984). Therefore, the resolution by this Court of those questions presented in *School Committee of the Town of Burlington, supra,* which are dispositive of the issues in this case, may obviate the necessity for the United States District Court for the Northern District of Texas to determine whether the Respondents are entitled to reimbursement under the EAHCA.

THERE IS A CONFLICT AMONG THE CIRCUITS

It is clear that the conflict between the United States Court of Appeals for the Fifth Circuit and the Fourth and Eighth Circuits is one that can be effectively resolved only by the prompt action of the Supreme Court alone. The Fifth Circuit's decision to vacate and remand the District Court's grant of summary judgment in order for the District Court to determine whether the Respondents are entitled to reimbursement under the EAHCA is contrary to the decisions of the Fourth Circuit in *Stemple, supra,* and *Rowe, supra,* and a decision of the Eighth Circuit in *Miener, supra,* all of which held that there is no reimbursement under the EAHCA to parents for the unilateral placement of their children. In declining to follow the Fourth and Eighth Circuits, as well as the clear language of the Congress, the Fifth Circuit panel cited the opinions of the Eleventh Circuit in *Powell v. Defore,* 699 F.2d 1078, 1081 (11th Cir. 1983), the Ninth Circuit in *Department of Education v. Katherine D.,* 727 F.2d 809, 816-17 (9th Cir. 1983), the Seventh Circuit in *Anderson v. Thompson, supra,* at 1213, and its own opinion in *Scokin v. State of Texas,* 723 F.2d 432, 439 (5th Cir. 1984), which decisions recognized that reimbursement for unilateral placement by a parent may be proper in "exceptional circumstances." (Appendix B-3).

The Fifth Circuit panel did not, however, determine whether such "exceptional circumstances" were present but rather opined that it had not had occasion to pass on the propriety of the exception created by dicta of the *Anderson* court which allowed reimbursement when there was a "serious risk of injury to [a] child's physical health" by the maintenance of current educational placement. See *Anderson, supra,* at 1214. There is absolutely no evidence of such

alleged "exceptional circumstances" in the case at bar. Even the statements attached to Respondents' Opposition to Summary Judgment were not sworn to. (R. 400, 406).

In *Stemple*, the Fourth Circuit Court of Appeals determined that the language of 20 U.S.C. § 1415(e)(3) when read literally created a duty on the part of parents who avail themselves of the hearing and review provisions of that section to keep their child in his current educational assignment while the hearing and review provisions are pending, absent agreement between them and the education authorities that some different arrangement be made. *Supra*, at 897. This duty "negates any right on the part of parents in violation of the duty and in the absence of agreement, to elect unilaterally to place their child in private school and recover the tuition costs thus incurred." *Stemple, supra*, at 897. Surely it would also negate their right to reimbursement for after school child care. The *Stemple* Court found support for its literal interpretation of 20 U.S.C. §1415(e)(3) from an overall consideration of the EAHCA, its precursors, and the reference to 20 U.S.C. § 1415(e)(3) in the legislative history. *Supra*, at 898. In promulgating the EAHCA, Congress assumed major control and financing of the national program of education of handicapped children. *Stemple, supra*, at 898. As part of that effort, the Fourth Circuit stated:

> Congress was providing for the strengthening and upgrading of evaluation procedures and it enacted a generous bill of rights for parents, guardians, and surrogates of handicapped children who might wish to contest the evaluation and placement policies of educational authorities. There would be reason and design in saying that while the procedures for administrative hearing, administrative review and judicial review mandated by Con-

> gress were being employed, the status quo even including the payment of benefits (see, e.g., Longshoremen's and Harbor Workers' Compensation Act § 21(b), 33 U.S.C. § 921(b), pending litigation at the administrative and judicial level until an ultimate resolution is reached is a familiar one in American law. For example, under Rule 65, F.R.Civ.P., courts will ordinarily refrain from issuing preliminary injunctions which threaten to disturb the status quo and they will frame any equitable relief to preserve the last uncontested status between the parties which preceded the controversy until the outcome of the final hearing. 11 Wright and Miller, *Federal Practice and Procedure*, § 2948, at 464-66. Thus we think that the statute means just what it says.

Stemple, *supra*, at 898. "Absent a clearly expressed legislative intention to the contrary [the statutory] language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056 (1980) and *American Bank and Trust Co. v. Dallas County*, 103 S.Ct. 3369, 3374 (1983).

Three years later, the Fourth Circuit had occasion to reconsider its decision in *Stemple*, i.e., whether reimbursement was barred by the parents' unilateral act of placing their child. *Rowe v. Henry County School Board*, *supra*. That Court reaffirmed its holding in *Stemple* in its determination that once a school system identified the educational problems of a handicapped student and offered to place him in a special program, the child's parents incurred a duty not to alter the child's school placement until a decision not to contest the school system's placement decision was reached, or if a contest ensued, until that contest was determined, so that the parents' subsequent decision to remove the child to a private school violated such duty and acted to negate whatever right they possessed to recover their private

school tuition payments. *Rowe, supra,* at 118-119. In our case, the child was not placed, only after school help was hired.

The opinion in *Rowe* notes that the Seventh Circuit's dicta in *Anderson* recognizes that reimbursement may be justified if "exceptional circumstances" are present. However, the *Anderson* Court took great pains to factually distinguish that case from Rowe's progenitor, *Stemple.* The Seven Circuit Court in *Anderson* pointed out that the facts in *Stemple* involved a handicapped child who was enrolled in a public school program and whose special needs had been assessed and placement had been decided when the parents became dissatisfied and moved her to a private school. *Supra,* at 1209. The child was subsequently re-enrolled in the public school, but the parents sought tuition reimbursement for the costs of sending their daughter to private school at the time that they sent her to the private school. *Anderson, supra,* at 1209. The *Anderson* Court determined that the Fourth Circuit concluded on that factual basis that 20 U.S.C. § 1415(e) (3) was controlling on the issue of whether the parents could receive tuition reimbursement. *Supra,* at 1209.

The Court in *Anderson* stated that *Stemple* was factually dissimilar from the case before it due to the fact that the Anderson child was attending private and public schools, each on a half-time basis, when the school authorities first assessed her special needs and decided on a placement. *Supra,* at 1209. On that basis, the *Anderson* Court found that the child's parents were complying at least in part with the dictates of 20 U.S.C. § 1415(e) (3) by keeping the child at the private school which was her then-current half-time placement, and as a result, the Seventh Circuit determined that 20 U.S.C. § 1415(e) (3), applied as the Fourth Circuit

in *Stemple* suggested, did not preclude reimbursement. *Supra*, at 1209. The Court in *Anderson* went on to state that in any case in which a child is already receiving services that the school authorities subsequently determine they are not required to provide, reimbursement is not precluded by 20 U.S.C. § 1415(e)(3). *Supra*, at 1209.

The factual situation in the case at bar is akin to that in *Stemple*, and is not similar to the facts upon which the dicta in *Anderson* are premised. Sterling Wilks was first enrolled in the GISD and placed at the Cooperative Behavior Center operated by the School District in February of 1979 after his mother began making preparations for his enrollment in January of 1979. (A. Vol. 1, p. 20). The after school help and "other expenses" which were not otherwise identified, for which Victoria Wilks is seeking reimbursement commenced in mid-year of 1982, and terminated in late November of 1982, according to the unsworn statements which do not constitute evidence. (R. 390, 402, 403 and 405). Therefore, the holding in *Stemple* precludes any reimbursement under 20 U.S.C. § 1415(e)(3) for after school help which was obtained unilaterally and for "other expenses" which were incurred unilaterally over three years after Sterling Wilks was first enrolled in the GISD and placed at the Cooperative Behavior Center.

The wisdom of the dicta in *Anderson*, which first enunciated the principle of "exceptional circumstances" has been questioned by the Eighth Circuit in *Miener*. *Supra*, at 980. The Eighth Circuit Court of Appeals stated in *Miener* that

> [w]hile Congress might well have wished to provide a right of action for damages in some exceptional circumstances, we entertain serious doubt that the statute itself contains warrant for a general right . . .

Miener, supra, at 980.

Since there are conflicting views among the Circuits as to whether 20 U.S.C. § 1415(e)(3) should be mandatory or directory, it is important to consider that the interpretation which *Stemple* and its progeny gave to that section of EAHCA is not inflexible and does not necessarily bar a change in placement under EAHCA while proceedings are pending. The parents may change the placement while proceedings are pending provided the local educational agency agrees to change. 20 U.S.C. § 1415(e)(3). There is nothing inflexible about asking private persons not to attempt to incur huge charges to the public treasury without official authorization. Furthermore, there is no evidence that Mrs. Wilks even sought such authorization before acting. In addition, there is no basis for a belief that local educational authorities will so frequently and deliberately disregard their duties toward handicapped children under the EAHCA that self-help is the only practicable remedy. All presumptions are to the contrary. *O'Shea v. Littleton*, 414 U.S. 488, 496-497, 94 S.Ct. 669, 676 (1974). Furthermore, states and local school districts are required to comply with the EAHCA or they must face serious financial sanctions. 20 U.S.C. § 1414(b) and (d) and § 1416. Preliminary injunctive relief to order a specific placement may arguably also be appropriate in certain factual situations, not present in the case at bar, to prevent irreparable damage while proceedings under 20 U.S.C. § 1415(e)(2) are pending.[1] See *Stacey G. v. Pasadena Independent School District*, 695 F.2d 949, 955, n.5 (5th Cir. 1983).

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[1]However, the Respondents chose not to pursue their motion for a preliminary injunction (R. 419), nor did the Counterclaim request such after school services.

Also, prominent by its omission in the EAHCA is any mention of self-help to parents who are dissatisfied with a local or state mandated placement but who if Congress had chosen, could have been allocated the financial risk of reimbursement if the self-help had proved justifiable. However, in 20 U.S.C. § 1415(e)(3) Congress chose to prohibit self-help, which prohibition could have been enacted to avoid undue pressure on state and local authorities to ratify parental decisions after the fact, to avoid inequities between the abilities of poorer parents and wealthier parents who would be more likely to take financial risks, and to avoid totally inappropriate private school placements.

Not having had occasion to pass on the propriety of "exceptional circumstances," the Fifth Circuit determined that such a consideration was not properly decided on an undeveloped factual record and ordered the District Court's Order of Summary Judgment vacated and remanded because a substantial question existed whether Mrs. Wilks was entitled to reimbursement under the EAHAC. The Counterclaim raises no such question. The panel thus rejected the position of the Fourth and Eighth Circuit Courts of Appeal which have already considered whether reimbursement is available under EAHCA for unilateral placement of handicapped children by their parents. The conflict is explicit and direct. The Court should grant a writ of certiorari to resolve this conflict.

THE QUESTIONS ARE SUBSTANTIAL

The Court has recently had the opportunity in *School Committee of the Town of Burlington, supra,* to consider whether damages are available to parents under EAHCA for private school tuition and related expenses incurred in the education of a handicapped child, and whether under

the EAHCA, where parents unilaterally decided to place a child in a private school, they forfeit the right to be reimbursed for the tuition and expenses related to such placement. If this Court decides that damages are not available under the EAHCA or should this Court decide that parents are not entitled to reimbursement for unilateral placement, the Fifth Circuit's decision in this cause should be overturned. However, if this Court departs from the logic of the Fourth and Eighth Circuit Courts of Appeal, the next question that is before this Court in the instant action is whether there are exceptions to 20 U.S.C. § 1415(e)(3) which would allow reimbursement to parents for unilateral employment of after school hours help for their handicapped children, which was formulated by the dicta of the Seventh Circuit in *Anderson, supra.* These questions are important ones on which this Court should rule.

The Fifth Circuit panel's resolution of these sensitive issues obviously invites parents of handicapped children to unilaterally employ child care help at home after school or to place their children unilaterally in a private school setting and then request reimbursement for the same. This is the first Court that has held that home child care may be chargeable to the school district. A great deal of litigation will, therefore, be generated in the federal courts on the strength of the panel's holding. School districts and states can expect to face a plethora of federal challenges to their duly promulgated IEP's, and regulations, and policies affecting handicapped children if the panel decision stands. The vast amounts of public resources which undoubtedly will be consumed in this forthcoming litigation are resources that could otherwise be used to help these handicapped children. The specter of these oncoming legal battles, with their attendant expense and consumption of judicial resources,

genuinely merits the attention of this Court before the floodgates are opened in this highly sensitive and emotional area.

Needs of handicapped children have been and should be addressed legislatively rather than by the judiciary. Allowing reimbursement to parents who have unilaterally provided home child care may be more for the parents' benefit than for the benefit of their handicapped children. This decision unless reversed will institute a sweeping change throughout the nation which will stand as a harbinger of unnecessary and unwarranted judicial interference in an area which Congress has delegated to the States and local school districts for implementation. The timely resolution of this issue is as vital to all states, state agencies, and school districts across the nation as well as the United States government, as it is to the GISD, Sterling Wilks and his mother.

THE COURT OF APPEALS DECISION IS INCORRECT

Petitioners contend that damages are not available to parents under the EAHCA, but that if they are available, the Respondents are barred from the right to be reimbursed for their unilateral employment of after school hours help for Sterling under 20 U.S.C. § 1415(e)(3). Furthermore, the Petitioners state that there are no exceptions to the clear and explicit language of 20 U.S.C. § 1415(e)(3), which requires that the child shall remain in his then current educational placement until all proceedings to change his placement have been completed. However, assuming arguendo that parents may be entitled to reimbursement under the EAHCA in "exceptional circumstances," the Respondents are barred from reimbursement because they have not alleged in their Counterclaim or offered any evidence that Mrs. Wilks' hiring of after school hours help

for Sterling and "other expenses" for which she is seeking reimbursement were necessary to protect Sterling's physical health from "serious risk of injury." See *Anderson, supra,* at 1214. This is especially true in this case where the experts testified that Mrs. Wilks was capable of caring for Sterling after school hours. (A. Vol. 1, p. 323). Since Mrs. Wilks was the head of a one parent home with two children, she no doubt needed help from time to time with both children but the cost of such help is not provided for in the EAHCA.

The law simply does not permit a recovery of general tort damages such as those requested by the Respondents. Not a single reported decision has allowed a recovery based on a quasi-tort measure of damage. In *Anderson,* the Seventh Circuit rejected a general damage remedy for a violation of the Act and after carefully reviewing the language of 20 U.S.C. § 1415 to determine its purpose concluded:

> *Neither the statutory language nor the context in which it appears demonstrates a congressional intent to create any type of educational malpractice action.* Congress instead has designed a detailed and multilevel procedure through which an aggrieved parent can ultimately seek an "appropriate" program decision from the District Court.

Supra, at 1211 (emphasis added).

The Seventh Circuit then addressed the plaintiffs' argument that a general damage remedy was necessary to deter violations of the EAHCA and rejected this proposition by holding that the Act's provisions for forfeiture of federal funds provided sufficient deterrent. *Anderson, supra,* at 1213, n.13. Although the Seventh Circuit in dicta went on to describe a very narrow exception to the general rule barring damage recoveries under the EAHCA, the Court immediately

restricted its narrow exception even further by limiting recovery under the Act to a measure of damages based on reimbursement of expenses only. The Seventh Circuit Court of Appeals held:

> Parents' costs of obtaining services that the school district was required to provide are the *only* appropriate money damages in these exceptional circumstances. *In no event can we imagine that tort liability damages were intended.*

Anderson, supra, at 1213, n.12 (emphasis added).

Other federal courts have followed the Seventh Circuit's lead by refusing a general measure of damages in EAHCA actions. The Fifth Circuit has rejected a measure of damages based on tort doctrines for violations of the EAHCA. *Marvin H. v. Austin Independent School District,* 714 F.2d 1348 (5th Cir. 1983) and *Scokin, supra,* at 438-439.

In *Marvin H.*, the Fifth Circuit rejected the plaintiffs' claim for reimbursement of expenses, which included costs for private psychiatric services for the child, because the parents' actions were taken without the consent of the school district, just as Mrs. Wilks' actions were taken unilaterally in the instant case, and likewise rejected the plaintiffs' claim for actual, compensatory and punitive damages under the EAHCA, which included a claim for mental anguish suffered by the parents. *Supra,* at 1352, 1354, 1356. The Fifth Circuit's severe restriction of damages in EAHCA actions necessarily precludes Wilks' general damage claim under this Act as a matter of law.

Assuming arguendo that parents may be entitled to reimbursement under the EAHCA in "exceptional circumstances," Mrs. Wilks cannot recover her out-of-pocket expenses because she has not pled in her Counterclaim or even prof-

fered any evidence of "exceptional circumstances," i.e., that her hiring of after school hours help for Sterling for which she is seeking reimbursement was necessary to protect Sterling's physical health from a "serious risk of injury," assuming Mrs. Wilks discharged her duties as a parent and custodial duties owed Sterling. See *Anderson, supra,* at 1214.

The only specific item of expense incurred by Mrs. Wilks since she requested residential placement for Sterling on September 18, 1981, for which she now seeks reimbursement is the expense of after school hours child care for Sterling and unspecified "other expenses". (R. 420). Although Mrs. Wilks never pled this specific item of special damages in her Counterclaim as required by Fed. R. Civ. P. 9(g), she now claims in her unsworn statement that she hired Mr. Cox in May, 1982, to work with Sterling after school in order to supplement the instruction given to Sterling, (R. 390)[2] although it was not provided in the IEP. Mrs. Wilks does not explain why she, as a parent who was qualified to render the after school care to Sterling, failed to do so and hired Mr. Cox to do it instead of doing it herself. Mrs. Wilks is barred from recovering this expense because her act constituted a unilateral procurement of private services for Sterling without the consent of the school district in violation of 20 U.S.C. § 1415(e)(3), and because a judgment must be based specifically and exclusively on the pleadings and proof. *United Transportation Union v. State Bar of Michigan,* 401 U.S. 576, 581, 91 S.Ct. 1076, 1080 (1971).

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[2]However, the "affidavit" of Victoria Wilks is an unsworn statement and cannot be considered evidence sufficient to establish a genuine issue of fact under Fed. R. Civ. P. 56(e). See *Adickes v. S. H. Kress and Co.,* 398 U.S. 144, 159, 90 S.Ct. 1598, 1609 (1970).

The Respondents' Counterclaim is clearly insufficient because it does not contain any allegation that any "exceptional circumstances" existed at or after the time Mrs. Wilks requested residential placement for Sterling on September 18, 1981. Nor did the Respondents offer any evidence to the District Court to avoid summary judgment on this issue.

In the case at bar, the Respondents never alleged that the after school hours services offered by Pat Cox to Sterling were "necessary" to safeguard his physical health in addition to the parental care owed by Mrs. Wilks. The Seventh Circuit in *Anderson* determined that damages were not appropriate in that case because the issue of danger to the handicapped student's physical health was not raised. *Supra*, at 1214. Neither Respondents' Counterclaim nor profferred evidence "contain allegations which implicate the kind of serious physical health dangers contemplated by *Anderson*". *Williams v. Overturf*, 580 F.Supp. 1365, 1371 (W.D.Wis. 1984). In *Williams*, the Court found no "exceptional circumstances" which would warrant reimbursement where the parents had alleged improper treatment and there was a discontinuation of one-to-one instruction to the child. *Id.*

Indeed, the only "services" which are presently in "dispute" in this suit for reimbursement of expenses are the services of Mr. Cox, who provided after school home care for Sterling, not residential placement services. Since even under the *Anderson* rationale a parent at most may recover only the cost of services which "should have been provided by the school district," Mrs. Wilks cannot recover reimbursement for the cost of home care because she has insisted that it was a *residential placement — not home care* — that "should have been provided" by the GISD. See *Anderson, supra*, at 1214. Accordingly, Mrs. Wilks' failure to plead in her Counterclaim or prove evidence of the "exceptional circumstances" requiring after school hours help, coupled with her plea for residential placement for Sterling, provided the District Court with a suitable basis for granting the Appellees' Motion for Summary Judgment.

Thus, in the absence of any pleaded allegations or proffered evidence directed to either portion of the "exceptional circumstances" test established in *Anderson*, the respondents' Counterclaim was properly dismissed because it failed to state a claim upon which relief could be granted. *Mark R. v. Board of Education*, 546 F.Supp. 1027 (N.D.Ill. 1982), *aff'd*, 705 F.2d 462 (7th Cir. 1983).

Summary judgment was likewise entered for the defendant state education officials in *William S. v. Gill*, 572 F.Supp. 509 (N.D. Ill. 1983), which involved a claim for damages under EAHCA. The plaintiffs alleged that a handicapped student had not benefited from the instruction he had received in the defendants' facility but rather had deteriorated markedly after he left a private facility. However, the Court found that William S. "was not exposed to any 'serious risk of injury to [his] physical health' (*Anderson*, 658 F.2d at 1214)", and that the "[c]ampus had sufficient staff and resources to handle handicapped children like William." *William S., supra*, at 516.

Mrs. Wilks' claims for reimbursement should also be denied for the additional reason that she failed to pursue her administrative remedies available if she had actually believed Sterling had received an improper placement. Although the Respondents in their Appellants' Fifth Circuit Brief claim "restitution" for Mrs. Wilks' expenses incurred as far back as 1979 (Appellants' Brief at 33), Mrs. Wilks never complained about Sterling's placement until September 18, 1981, when she first requested the School District to offer him a residential placement. (R. 59). The Respondents' failure to complain about Sterling's educational placement in any prior year strips them of the ability to recover damages suffered or reimbursement of expenses incurred in any year prior to the time Mrs. Wilks made her request under the EAHCA, § 504 of the Rehabilitation Act (29 U.S.C. § 794), or 42 U.S.C. § 1983, because of the parent's failure to exhaust administrative remedies. *Quackenbush v. Johnson City School District*, 716 F.2d 141, 147 (2d Cir. 1983), *cert. denied*, 104 S.Ct. 1426 (1984). *See, Gregg B. v.*

Board of Education, 535 F.Supp. 1333, 1337 (E.D.N.Y. 1982). For the reasons set forth herein, all of the Respondents' monetary claims are barred as a matter of law. Therefore, the District Court properly rendered a summary judgment in this case.

The Fifth Circuit's refusal to apply the prevailing precedent established by the Fourth Circuit in *Stemple* as well as the potential impact of the Fifth Circuit's decision on school districts, states, and state agencies is so erroneous as to call for review by this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

LAW OFFICES OF EARL LUNA, P.C.

By: Earl Luna

EARL LUNA
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ATTORNEYS FOR PETITIONERS

PROOF OF SERVICE

THE STATE OF TEXAS }
COUNTY OF DALLAS }

Before me, the undersigned Notary Public in and for Dallas County, Texas, on this day personally appeared Earl Luna, who being by me duly sworn, upon oath stated: I, Earl Luna, am a member of the Bar of the Supreme Court of the United States and have been the attorney of record for Petitioners herein in all proceedings in which they have been involved in the Courts below.

I further state upon oath that on the 18th day of April, 1985, I served copies of the foregoing Petition for Writ of Certiorari on the Respondents by depositing the same in the United States mail, with first-class postage prepaid, addressed to the following counsel of record in the Courts below, at the address indicated, to-wit: Mr. Reed Martin, Advocacy, Inc., 7700 Chevy Chase Drive, Suite 300, Austin, Texas 78752.

Earl Luna

SUBSCRIBED and SWORN TO before me by the said Earl Luna, on this the 18th day of April, 1985.

Betty Jarratt
Notary Public, State of Texas
My commission expires 11/30/88

APPENDIX

In The

United States District Court

FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

No. CA3-82-0470-F

GARLAND INDEPENDENT SCHOOL DISTRICT, et al.

VERSUS

STERLING W., BNF VICTORIA WILKS, et al.

ORDER

Came to be considered Plaintiff's Motion for Summary Judgment. The main issue that has arisen recently in this case is whether the claims asserted should be dismissed as moot. The Court finds that the case is now moot and should be dismissed.

In 1981, Plaintiff Sterling W. was an eight year old male who resided in Sachse, Texas, within the jurisdiction of the Garland Independent School District. Sterling is a handicapped student within the meaning of the Education All for Handicapped Children Act of 1975 (EAHCA). Sterling was placed at the Cooperative Behavior Center (CBC) operated by the Garland Independent School District as a result of the ARD Committee's recommendation in conformance with the IEP which was developed for him. However, Mrs. Wilks disagreed with this placement and asked for a 24 hour/12 month continuous residential placement for Sterling. The case was originally heard by an Impartial Hearing Officer who recommended a residential placement for Sterling in order for him to develop to his full potential. Plaintiff's then brought this suit to overturn the Hearing Officer's decision. In July of 1983, Sterling W. left the jurisdiction of the GISD and now resides within the jurisdiction of the Round Rock Independent School District.

Any question on the placement of Sterling within the GISD is moot. Since Sterling and his Mother no longer live within the jurisdiction of the GISD, but instead have become residents of the Round Rock Independent School District subject to its jurisdiction, a viable controversy no longer exists in this case. To pursue the issue now would be to render an advisory opinion which is outside of this Court's jurisdiction. *DeFunis v. Odegaard*, 416 U.S. 312 (1974); *Monahan v. State of Nebraska*, 687 F.2d 1164 (8th Cir.-1982), *cert. den.* 103 S.Ct. 1252. Therefore, the case should be dismissed as moot.

It is ORDERED that the above entitled and numbered cause be dismissed.

Signed this 17th day of January, 1984.

ROBERT W. PORTER
UNITED STATES DISTRICT JUDGE

In The

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 84-1136

Summary Calendar

GARLAND INDEPENDENT SCHOOL DISTRICT and
THE COOPERATIVE BEHAVIOR CENTER,
Plaintiffs-Appellees,

VERSUS

STERLING WILKS, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Texas

(September 7, 1984)

Before GEE, JOHNSON and DAVIS, Circuit Judges.
DAVIS, Circuit Judge: *

I.

Eleven-year old Sterling Wilks is afflicted with a severe form of infantile autism, a condition characterized by a number of symptoms including extremely self-abusive behavior. Sterling attended a special education cooperative administered by the Garland Independent School District from 1979 until mid-1983, with the exception of a one-year period in which he attended a private institution and a seven-week period of hospitalization. The Garland co-op offered Sterling a thirty-hour per week, ten-month per year program. In June 1981, Mrs. Wilks had an intensive evaluation of Sterling performed by the Texas Research Institute

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

for Mental Sciences. Based on this evaluation, she requested that the school district provide Sterling with a "residential placement" for twelve months per year. The school district refused, and Mrs. Wilks requested an impartial hearing pursuant to § 1415 of the Education for All Handicapped Children Act (EAHCA), 20 U.S.C. § 1415. In November 1982, the hearing officer ordered a residential placement for Sterling. The school district appealed to the district court, and in addition urged the court to consider terminating Mrs. Wilks' parental rights. Mrs. Wilks counterclaimed for damages, under the EAHCA, the anti-discrimination provision of the Rehabilitation Act of 1974, 29 U.S.C. § 794, and 42 U.S.C. § 1983.

During all of this, Sterling continued to attend the Garland co-op. In May 1982, Mrs. Wilks hired a consultant to work with Sterling at home after school, on weekends and during the summer. In August 1983, with the district court action still pending, the Wilks moved from the Garland Independent School District. The district court, without addressing the damage claims, granted the school district's motion for summary judgment on the ground of mootness.

II.

In reviewing a grant of summary judgment, we examine the entire record, taking all evidence in the light most favorable to the opposing party, to determine if any question of material fact is present. FRCP 56(c); *Coulter v. Texaco Inc.*, 714 F.2d 467, 468 (5th Cir. 1983). In this case, a substantial question exists whether Mrs. Wilks is entitled to reimbursement under the EAHCA.

Section 1415(e)(2) of the EAHCA authorizes the district court to grant "appropriate" relief in an appeal under the Act. 20 U.S.C. § 1415(e)(2). We have held that this provision does not encompass reimbursement for private educational expenses incurred by parents without consent of the school district before the appeals process provided by the Act has been exhausted. *Scokin v. Texas*, 723 F.2d 432, 439 (5th Cir. 1984); *Marvin H. v. Austin Independent School*

District, 714 F.2d 1348, 1354, 1354 n. 7-8 (5th Cir. 1983). Other circuits have recognized that reimbursement in such a situation may be proper in "exceptional circumstances," including when the child's health could be endangered by maintenance of its current educational placement. *See, e.g. Powell v. DeFore*, 699 F.2d 1078, 1081 (11th Cir. 1983); *Department of Education v. Katherine D.*, 727 F.2d 809, 816-17 (9th Cir. 1983); *Anderson v. Thompson*, 658 F.2d 1205, 1213 (7th Cir. 1982). We have not had occasion to pass on the propriety of this exception, *see Scokin v. Texas*, 723 F.2d at 439, and it is not a question properly decided on an undeveloped factual record.

In light of *Scokin v. Texas* and the cases from other circuits cited above, Mrs. Wilks' claim for reimbursement was not barred as a matter of law. Taken in the light most favorable to Mrs. Wilks, the summary judgment evidence in the record reveals a substantial question of material fact concerning whether the program offered by the school, unsupplemented by additional services, would have resulted in physical harm to Sterling. The controversy was thus not moot for summary judgment purposes. We therefore vacate the order of the district court and remand for further factual development and consideration in light of the cases cited above.

The district court did not address Mrs. Wilks' damage claims under § 769 of the Rehabilitation Act and § 1983 and she has chosen not to brief these issues on appeal. We therefore venture no opinion on the viability of these claims at this stage of the case.

VACATED and REMANDED.

In The

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 84-1136

GARLAND INDEPENDENT SCHOOL DISTRICT, and
THE COOPERATIVE BEHAVIOR CENTER,
Plaintiffs-Appellees,

VERSUS

STERLING WILKS, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Texas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 09/07/84, 5 Cir., 198 ..., ... F.2d .....)
(FEBRUARY 13, 1985)

Before GEE, JOHNSON, and DAVIS, Circuit Judges.
PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

W. EUGENE DAVIS
ENTERED FOR THE COURT:
United States Circuit Judge

In The

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 84-1136

Summary Calendar

D. C. Docket No. CA-3-82-0470-F

GARLAND INDEPENDENT SCHOOL DISTRICT and
THE COOPERATIVE BEHAVIOR CENTER,
Plaintiffs-Appellees,

VERSUS

STERLING WILKS, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Texas

Before GEE, JOHNSON and DAVIS, Circuit Judges.

JUDGEMENT

This cause came on to be heard on the record on appeal and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 34;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, vacated, and that this cause be, and the same is hereby, remanded to the said District Court in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that plaintiffs-appellees pay to defendants-appellants the costs on appeal, to be taxed by the Clerk of this Court.

September 7, 1984

ISSUED AS MANDATE: February 25, 1985

In The

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 84-1136

GARLAND INDEPENDENT SCHOOL DISTRICT, and
THE COOPERATIVE BEHAVIOR CENTER,
Plaintiffs-Appellees,

VERSUS

STERLING WILKS, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Texas

ORDER

☐ The motion of ..... for ☐ stay [XX] recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

☑ The motion of Appellees ..... for ☐ stay [XX] recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including April 22, 1985, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

☐ The motion of ..... for a further stay of the issuance of the mandate is GRANTED to and including ....., under the same conditions as set forth in the preceding paragraph.

☐ The motion of ..... for a further stay of the issuance of the mandate is DENIED.

W. EUGENE DAVIS
UNITED STATES CIRCUIT JUDGE